IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	I.D. No. 0512020169
	)	
BRUCE WOOD,	)	
Defendant.	)	

Submitted: January 12, 2007
Decided: February 1, 2007

UPON THE STATE'S MOTIONS TO QUASH SUBPOENAS
GRANTED

Paul Wallace, Esquire and Josette Manning, Esquire, Deputy Attorneys General for the State.

Edmund Hillis, Esquire, Attorney for the Defendant.

PEGGY L. ABLEMAN, JUDGE

This is the Court's decision on two Motions filed by the State of Delaware to Quash Subpoenas *Duces Tecum* that were sought to be issued by the Court at the request of defense counsel in this criminal case. Defendant, Bruce Wood, is charged with eighteen counts of Rape in the First Degree and two counts of Continuous Sexual Abuse of a Child, crimes involving two alleged juvenile victims. The records that are the subject of these subpoenas are treatment and counseling notes from Survivors of Abuse and Recovery, Inc. (hereafter "S.O.A.R.") concerning one of the alleged minor victims, and all records concerning the second victim's family that are contained in the files of the Division of Family Services, this State's child protection agency. The documents sought by defense counsel were requested to be produced one month in advance of the originally scheduled trial date.

Positions of the Parties

The State has filed these Motions to Quash on the ground that Rule 17 is not a pretrial discovery rule and is only applicable to evidence that would be admissible at trial. The State submits that the defense is barred from requiring a third party to produce materials, even if relevant or for purposes of impeachment, and can only obtain pretrial discovery through the procedures of Rule 16.

The defendant did not initially file a response to the motions, presumably because the matter was the subject of an office conference with counsel and the Court. At that conference defense counsel

conceded the impropriety of using Rule 17(c) for pretrial discovery purposes. Notwithstanding the parties' apparent agreement that the subpoenas were improperly issued for pretrial discovery, the State has expressed its concern that the practice employed by the defense in this instance has continued to be utilized by defense attorneys for the procurement of documentary evidence that would not otherwise be discoverable under Rule 16.

While both the Delaware Superior Court and the Delaware Supreme Court have established certain procedures to be followed when this type of information is sought, the State requests the Court, in the context of this case, to reiterate and re-emphasize the interrelationship of Rules 16 and 17, and the competing rights that must be reconciled when the defense seeks such information pretrial, the extent of pretrial discovery that is permissible in criminal cases under the rules, and the proper procedures to be employed by the defense if these documents are sought in advance of trial. To that end, this decision represents an effort by this Court to dispel any confusion that may linger regarding the proper purpose and scope of Rules 16 and 17.

The defense has already requested, and the State has provided the defendant with all discovery required by Rule 16 as well as any *Brady* material within its possession. Included in the discovery that was produced by the State were the documents and files from the Division of Family Services. While this material was not required to be produced,

the State nevertheless turned over these documents "over and above" what is required.

The second subpoena at issue in this case seeks production of one victim's counselling records from S.O.A.R. Although the trial date has been continued, and as of this date, the subpoena to S.O.A.R. has not been reissued, the dilemma created by these subpoenas bears addressing in the context of this case. For reasons set forth more fully hereafter, the Motions to Quash are hereby granted.

Discussion

I turn first to Rule 16 of the Superior Court Criminal Rules as it governs the criminal discovery and disclosure of evidence by the State. Although the subpoenas sought to be quashed in this case were issued under Rule 17,[1] it is Rule 16 that must be examined first, as it is this rule that governs criminal discovery and disclosure of evidence by the State.

As the language of the Rule establishes in subsection (a)(2), a defendant is not entitled to discovery or inspection of "statements of state witnesses or prospective witnesses." Under the plain wording of the Rule, the victims' statements to health care or treatment providers are not discoverable. Similarly, "Rule 16 does not provide for the discovery

[1] *For production of documentary evidence and objects.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

of privileged medical records of witnesses, especially those records which are unrelated to the alleged criminal activity of the defendant. Furthermore, Rule 16 only requires the State to produce that which is in its possession or control."[2]

In this case, as noted, the defense has not sought this evidence under Rule 16, but has instead bypassed that Rule by the issuance of subpoenas *duces tecum* directly to treatment or service providers, pursuant to Rule 17(c) for production of materials that are otherwise expressly excluded from discovery under Rule 16. It is this practice to which the State strongly objects.

Rule 17(c), as distinct from the pretrial information gathering objective of Rule 16, allows for the production of documentary evidence and objects as follows:

> *For production of documentary evidence and objects.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

In general, Rule 17(c) may be properly invoked only for the procurement of documentary evidence or documents which are

[2] *State v. Williams*, 1997 WL 524052, at #1 (Del. Super. Ct. June 19, 1997).

admissible in evidence at trial.[3] The Rule is not to be read as in invitation to defense counsel to obtain documents in response to a subpoena *duces tecum* prior to trial, or before the witness whose statement is sought has testified. Rather, Rule 17(c) is, for the most part, a restatement of pre-existing law relating to the issuance of trial subpoenas.[4] A subpoena *duces tecum* may not be used either to ascertain the existence of documentary evidence or as a "fishing expedition" to obtain statements of prospective witnesses that would not otherwise be discoverable.

More than fifty years ago, the United States Supreme Court considered the interrelationship of Rules 16 and 17 of the Federal Rules of Criminal Procedure, which were adopted almost verbatim as Delaware Rules of Criminal Procedure, in language which applies with equal force today:

> It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms. Rule 17 provides for the usual subpoena *ad testificandum* and *duces tecum*, which may be issued by the clerk, with the provision that the court may direct the materials designated in the subpoena *duces tecum* to be produced at a specified time and place for inspection by the defendant. Rule 17(c) was not intended to

[3] *State v. Hutchins*, 138 A.2d 342, 344-45 (Del. 1957); *McBride v. State*, 477 A.2d 174, 180-81 (Del. 1984); *State v. Redd*, 1993 WL 258717 (Del. Super. Ct. June 18, 1993); *Williams*, 1997 WL 524052; *State v. Patterson,* 1998 WL 438673 *(*Del. Super. Ct. May 1, 1998)*; State v. Madric,* 1989 WL 124900, (Del. Super. Ct. Aug. 18, 1989); *State v. Block*, 2000 WL 303351 (Del. Super. Ct. Feb. 18, 2000).

[4] In certain circumstances, however, a court may direct that a subpoena *duces tecum* be returnable prior to trial and may permit the documents that have been subpoenaed to be inspected on a designated return day. The purpose of this Rule was not to grant additional discovery but simply to expedite trial where voluminous documents will be produced in response to subpoena.

provide an additional means of discovery . . .[5]

In keeping with the Supreme Court's admonition in *Bowman Dairy*,[6] Delaware courts have repeatedly and consistently denied Motions to Compel pretrial production of documents through the subpoena process, or have quashed subpoenas seeking pretrial disclosure, and have emphasized that courts must "guard against [Rule 17(c)] being used as such, thus rendering Rule 16 meaningless . . ."[7]

From the foregoing analysis, the Court readily concludes that the information that the defendant has sought to obtain through the issuance of subpoenas is specifically excluded from discovery under Rule 16, and that the State's Motions to Quash must be granted. That ruling does not end the Court's inquiry, however, as there are several competing rights that are implicated in this instance which must be reconciled in order to adequately protect the rights of the accused to full disclosure of any exculpatory material and of the right of the accused in a criminal prosecution to be confronted with the witnesses against him. Moreover, where, as here, the records sought are highly personal to the victims and may even be privileged, the victims' right to privacy must be weighed against the defendant's right to prepare an adequate defense for trial as well as his right to confront the witnesses against him.

[5]*Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951)(emphasis added).
[6]*Id*.
[7]*State v. Hutchins*, *supra* at 181.

Several Delaware cases have explored the issue of whether a defendant is entitled to obtain medical or psychiatric records in advance of trial for impeachment purposes. One theory under which such records are sought is that propounded in the case of *Brady v. Maryland*,[8] requiring the State to disclose any favorable evidence within its possession that is material to the guilt or punishment of the accused. Thus, under the *Brady* rule, any evidence that may be considered exculpatory must be disclosed. Moreover, in *Bagley v. United States*,[9] the Supreme Court held that impeachment evidence falls within the *Brady* rule.

The rule in *Brady*, as in Rule 16, only applies to evidence that is in the possession of the State. Possession in this context has been broadly defined to extend to other government agencies (including the Division of Family Services). The records sought in this case that have not been provided, however, are located in the private counseling offices of S.O.A.R. and are not, therefore, in the possession of the State of Delaware.

In general, statements of witnesses that may be considered *Brady* material are not discoverable until the State has put the witness on the stand at trial, particularly in the case of impeachment evidence. Delaware Courts have not been entirely consistent in establishing an

[8]373 U.S. 83 (1963).
[9]473 U.S. 667 (1985).

appropriate time of disclosure, however, and appear to have approached the issue on a case-by-case analysis.

In *State v. Patterson*, for example, the Superior Court in recognizing that the time of production may vary from case to case, held that the evidence must be produced "so as to allow the defendant sufficient time to effectively use the material." The defendant was charged in that case with Unlawful Sexual Intercourse in the First Degree, as well as several other associated lesser offenses. Defendant was in possession of a copy of the hospital emergency room records which made reference to the complaining witness' prior psychiatric hospitalizations. Defendant sought to obtain those records by filing a motion.

The Court initially recognized that there was no question of whether the witness, whose psychiatric records were sought, would testify because the witness' testimony would absolutely be required for the State to prove its case. Because the Court had already been provided with copies of the sought-after records, it had an opportunity for *in camera* review in advance of its ruling. The Court in *Patterson* concluded from its review that time would be needed for the defense to investigate and consult an expert witness, resulting in a decision that the material must be disclosed in advance.

The Court's inquiry went further, however, because it recognized that the records also implicated the patient-doctor privilege under DRE

503. It thus employed a balancing test by considering the fact that the material was necessary to an effective cross-examination of the complaining witness under *Brady*, as well as the defendant's fundamental Sixth Amendment right to confront the witnesses against him, as juxtaposed against the witness' privacy interests in her medical records.

Ultimately, the *Patterson* Court held that the psychiatric records must be produced prior to trial to enable the defendant to conduct an effective cross-examination. The defendant's right to a fair trial was deemed to outweigh the witness' right to privacy in the privileged materials. In so doing, the Court approvingly adopted a procedure developed by the Connecticut Supreme Court whereby it would review privileged records *in camera*, in cases where a showing is first made that failure to produce the material would likely impair the defendant's right of confrontation.

In an earlier case, *Redd*,[10] the Superior Court held on the other hand, that the defendant's right to confrontation or to effective cross-examination was not sufficiently compelling to justify pretrial disclosure of privileged medical records. In *Redd*, the Superior Court denied defendant's motion seeking the issuance of certain subpoenas under Criminal Rule 17 to the victims school psychologists, psychiatrist, and custodian of hospital emergency department treatment records. The

[10]1993 WL 258717 (Del. Super.).

defendant sought the records to cross-examine the victim's credibility at trial, and also to submit them to its own expert, who could then testify concerning the psychological dynamics and behavioral patterns of complainants in sexual abuse cases as well as the appropriate methods of interrogation of such witnesses.

The *Redd* Court held that a Rule 17 subpoena was not to be used as a pretrial discovery tool and that statements of witnesses sought for the purposes of impeachment do not ripen discoverable evidence under the Rule until the witness has testified at trial and her credibility has been put into issue. The Court was also mindful of the fact that the defendant had already been furnished with police reports, copies of Child Protective Services notes, and a report of the victim's psychologist, which were not otherwise required to be produced under Rule 16. The Court did note, though, that the defendant might have a justifiable basis to request a recess during trial to prepare his expert.

Likewise, in *State v. Wynn*,[11] the Court reiterated that medical records are not discoverable under Rule 16 and that Rule 17(c) is not an alternative discovery tool to obtain them. After noting that the defendant has a "heavy burden" under both *Redd* and *Madric*[12] the Court held that the personal medical records of the alleged victim were not discoverable before trial, finding that "production of such records is not proper

[11] 1994 WL 476125 (Del. Super. Ct. June 16, 1994).
[12] *Madric* 1989 WL 124900.

because of their highly personal nature and the 'state's long-standing recognition of a privilege in patient-physician communication."

Persuaded by the Court's reasoning in *Redd*, the Superior Court in *State v. Block*,[13] under similar circumstances, ruled recently that it would not issue a subpoena for the production of records sought to impeach or otherwise attack the credibility of the complainant prior to trial. It also endorsed the *Redd* Court's analysis regarding a situation in which material sought by a defendant would be discoverable pretrial.

The test established in *Redd*, and later in *Block*, is worthy of repeating herein. To require production under Rule 17(c) prior to trial, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable in advance of trial by the exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial, and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition".

In *Block*, the Court substantially adopted the procedure that was followed in the *Patterson* case, the genesis of which was a line of Connecticut Supreme Court cases,[14] which carefully analyzed the competing interests implicated when confidential material may well impair the accused's right to cross-examination. That procedure, which

[13] *Block* 2000 WL 303351; *Redd* 1993 WL 258717.
[14] *State v. Hufford*, 533 A.2d 866 (Conn. 1987); *State v. Esposito*, 471 A.2d 949 (Conn. 1984).

is carefully and meticulously outlined in the *Block* case, is essentially as stated hereafter.

First, the defendant must be able to identify precisely the records he or she is seeking, and assert a "compelling basis" for the request. The Court will not permit a "fishing expedition" into the alleged victim's, or witness' medical and psychological history.

Second, defense counsel should attempt to procure the consent of the victim for release of the records before resorting to Rule 17 or the Court. Only in the event the victim refuses to consent should the defendant make an application to the Court pursuant to Superior Court Criminal Rule 17 for the issuance of a subpoena for the records to be reviewed by the Court.

Third, defendant must then demonstrate to the Court, with specificity, that the information he or she is seeking is relevant and material to his defense. Upon such a showing, the Court will then issue a subpoena for the records -- returnable to the Court -- for *in camera* review. The review should focus upon whether the records are relevant and sufficiently material to the defendant's case that they should be turned over pretrial. The Court has discretion to decide the relevance to the victim's credibility. If so, they will be produced to the defense.

Finally, the State is only obligated to search for records relating to the alleged victim if the State is aware of their existence. Defendant may ask the State to inquire of the victim if these records exist although the

State is not under an obligation to produce them. As noted, the State is only responsible for documents or records in its possession or control, or those that the victim has consented to disclosure. If the documents or records sought are not in the control or possession of the State, and the victim refuses to consent, then the defendant must first meet the criteria outlined above and either ask the Court for appropriate relief or wait until after the witness has testified at trial. Under no circumstances is the defendant entitled to the issuance of a subpoena *duces tecum* except for production on the day of trial, unless the defendant obtains prior Court approval.

Delaware Courts grappling with this issue have thus recognized that, in some instances, an *in camera* inspection of the privileged records enables the Court to preserve the witnesses' right to privacy and confidentiality, while justifying the breach of those rights only in cases where disclosing them to the defendant is necessary to protect his right of confrontation such as where *Brady* material is found to exist. In those instances, access to the records must be left to the discretion of the trial court, which is better able to assess the probative value of such evidence as it relates to the particular case before it, and to weigh that value against the individual's interest in the confidentiality of the records. Whether and to what extent access to the records should be granted to protect the defendant's right of confrontation must be determined on a case by case basis.

It is especially important that defense counsel not abuse the Rule 17(c) subpoena *duces tecum* procedure just outlined, when attempting to obtain the personal medical or counseling records of a victim or witness. In reality, the Court does not, and cannot, as a practical matter, monitor every subpoena requested by counsel to be issued by the Court. The subpoena power of a Court is a venerable weighty imperative in that it "commands" the person to whom it is directed to produce the designated records at a particular time. There may be some individuals in possession of such records that are so intimidated by the authority of the Court that they would not even consider challenging their responsibility to comply. Confidential or privileged records of an individual may be unwittingly turned over to defense counsel in violation of that person's privacy rights, or their production may breach the patient-psychiatrist or patient-doctor privilege. One of this Court's gate-keeping functions includes the protection of such individual rights, at least until it is established that a defendant's need for them outweighs any privacy interests. For this reason, it cannot be emphasized enough that counsel are expressly prohibited from issuing subpoenas *duces tecum* under Rule 17(c) for pretrial production without express permission of the Court.

Application of the foregoing standards for using Rule 17(c) requires this Court to grant the State's Motions to Quash.[15] First, there has been

[15]The Court does not find that defense counsel intentionally sought to acquire these records without following the proper procedures, but merely used the Rule loosely, as others have done, a practice that has become more widespread of late.

no showing of precisely which records the defense is seeking by the subpoena. If it is potential impeachment evidence, Delaware law does not require disclosure until after the victims testify. In addition to the vagueness of the request, it is also premature because the witnesses' credibility has not yet been put in issue.[16]

Similarly, defendant has not demonstrated that the material sought is relevant to his defense. This would require a showing of what the defendant expects these records to establish. In the event defendant is able to do this -- at the appropriate time -- the Court will then issue a subpoena so that the Court may review them *in camera* to determine whether they are sufficiently relevant to the credibility of the victims to overcome the witnesses' interest in their privacy.

CONCLUSION

For all of the foregoing reasons, the State's Motions to Quash Subpoenas to are hereby **GRANTED**.

IT IS SO ORDERED.

PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary
cc: Paul Wallace, Esquire
Josette Manning, Esquire
Edmund Hillis, Esquire

[16]The Court leaves open the possibility that defense counsel may request this same information during the trial and that it may be necessary to grant a recess to enable counsel to review the records.